

February 15, 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference No.: 05-0040

Ms. Kelly McDannald
KLM & Family Trucking
34335 Armington Rd.
Armington, IL 61721

Dear Ms. McDannald:

This is in response to the appeal you filed on behalf of your firm, KLM & Family Trucking (KLM & Family Trucking). We have carefully reviewed the material from the Illinois Department of Transportation (IDOT) as well as that you submitted, and have concluded that the denial of KLM & Family Trucking's certification as an eligible Disadvantaged Business Enterprise (DBE) under criteria set forth in 49 CFR Part 26 ("the Regulation") is supported by substantial evidence.

Your appeal is denied based upon our determination that substantial record evidence supports IDOT's conclusion that control by the disadvantaged owner is not real, substantial and continuing as required by 49 C.F.R. § 26.71, and that the disadvantaged owner does not possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day decisions on matters of management, policy and operations.

The specific reasons for the denial of your appeal include the following:

- 1) **The Regulation provides in §26.69(e) "The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee."**

§26.69(h)(1) state "You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining

ownership, all interests in a business or other assets obtained as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is –

- (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm.
- (ii) Involved in the same line of business; or engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you by clear and convincing evidence, that-

- (i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by the spouse with his or her own individual resources, provided that the spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

According to the record, KLM & Family Trucking is seeking certification in the construction services category of Trucking. The firm owns two tractors and three trailers. According to the record, your personal net worth does not exceed the \$750,000.00 threshold, so this is not an issue. The firm was established on October 17, 2003, as a sole proprietorship by you, the socially and economically disadvantaged owner. On December 5, 2003, you purchased a 1988 GMC Tractor and a 1990 East Trailer with two loans from ----- totaling \$12,800.00. On December 1, 2003, your husband,

-----, a non-disadvantaged person, gifted and transferred two trailers to the firm. On March 9, 2004, he gifted and transferred a 1996 Volvo Tractor to the firm. According to your application, the value of the gifts and transfers from your husband are valued at \$38,000.00. According to the record, ----- drives the truck for KLM & Family Trucking when the firm has work. It is also important to note that your husband drives fulltime for ----- as an owner operator. We agree with IDOT's conclusion that your ownership interest to acquire the firm was not real, substantial and continuing.

Your letter of rebuttal states "The denial letter suggests that this firm was established for the purpose of gaining DBE certification. This is not true. The firm was established with the intent to form an independent trucking business. I obtained my trucking authority in October of 2003. My intent was to work my trucks in the local construction field. Due to the fact that trucking is a hard business to break into, the local construction companies would not work my trucks, but told me that they would if I had DBE certification, which was the first I had heard of the certification. I then decided to peruse DBE certification. The fact that I stopped working for ----- was because they didn't need me any longer. The denial letter questions why I remained a clerk at ----- after I gained my trucking authority. I remained there because I could not get my business started yet and I gained knowledge about the inside workings of a trucking business. They had no knowledge of my intentions...The denial letter questions the gifting of two trailers and a truck from my husband. These were not gifts but rather a name change. The name change was merely to put all of the equipment in one name. I purchased a truck and trailer in KLM name then decided to transfer the name of the other equipment to make all equipment uniform. I am not reliant on the equipment that was transferred to the KLM name, due to the fact that I had my own equipment. The name change was not necessary except in the event that I obtained DBE certification and had more equipment to offer as a DBE firm." Substantial record evidence supports IDOT's conclusion.

2) §26.71(d) state "The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations."

§26.71(g) "The socially and economically disadvantaged owners must have an overall understanding of, and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than the managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other

participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control."

The record information reveals that your responsibility as owner is accounting, dispatching, scheduling maintenance, soliciting jobs, setting rates, invoicing, accounts receivable/payable, collecting and dealing with unions. According to your résumé, you worked for ----- from September 2002 – March 2004 as a Clerk. Your duties and responsibilities included accounting, billing, dispatching, customer service and record keeping. Prior to that, you worked for ----- from December 1997 to June 2002 where you were employed as an Assistant. Your responsibilities included caring for and teaching children, recordkeeping and communicating with parents. Prior to that, you were employed by ---- ----- from October 1984 to March 1987 as an Office Clerk. You were responsible for answering the telephone, data entry, record keeping and mail routing. You also have an Illinois Public Carrier Certificate which was issued on October 17, 2003.

-----, your non-disadvantaged husband, has twenty years experience in the trucking industry. In addition, he also operates the truck for your firm when the company has work. During the onsite review, you stated that your experience was being married to a truck driver for the past twenty years. We agree with IDOT's conclusion that the socially and economically disadvantaged owner does not have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate.

Your letter of rebuttal states that "The denial letter also suggests that my husband works for ----- . My husband drives one of my trucks that was leased to ----- . The relationship with ----- ----- was a product of the business environment. Most customers will not take a single truck unless they are DBE certified. The use of brokers is a common practice. They will not call KLM and Family Trucking without DBE certification. The letter further states that my husband had the expertise and background to control the business not I. I strongly disagree. I have vast knowledge about the day to day operations of trucking. I have been the record keeper, accountant, and dispatcher for 20 years. Also the experience I gained working in the office of a trucking company gave me knowledge I need to run my own company. ----- is the truck driver. He has never had a trucking

authority or his own business. He has been a truck driver for 20 years, not as a business man. The fact that my husband is a truck driver should not be held against me.” Substantial record evidence supports IDOT’s conclusion.

§26.71(k) (1) states “A socially and economically disadvantaged owner may control a firm even though one or more of the individual’s immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-à-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners-as distinct from the family as a whole control the firm, then the socially and economically disadvantaged owners have failed to carry the burden of proof concerning control, even though they may participate significantly in the firm’s activities.”

In summary, the information provided cumulatively supports a conclusion that KLM & Family Trucking does not meet the criteria as required for DBE certification under 49 CFR Parts 26. The company is, therefore, ineligible to participate as a DBE on IDOT’s Federal financially assisted projects. This determination is administratively final as of the date of this correspondence.

Sincerely,

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights

cc: IDOT